Filed 2/3/05 In re Peyton N. CA2/5

NOT TO BE PUBLISHED IN THE OFFICIAL REPORTS

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

SECOND APPELLATE DISTRICT

DIVISION FIVE

In re PEYTON N., a Person Coming Under the Juvenile Court Law.	B175723 (Los Angeles County Super. Ct. No. CK51530)
LOS ANGELES COUNTY DEPARTMENT OF CHILDREN AND FAMILY SERVICES, Plaintiff and Respondent, v. GEORGE N., Defendant and Appellant.	

APPEAL from a judgment of the Superior Court of Los Angeles County. Sherri S. Sobel, Temporary Judge. (Pursuant to Cal. Const., art. VI, § 21.) Affirmed.

John L. Dodd & Associates and Lisa A. DiGrazia for Defendant and Appellant.

Raymond Fortner, County Counsel, Larry Cory, Assistant County Counsel, and Pamela Landeros, Deputy County Counsel, for Plaintiff and Respondent.

George N. (father) appeals from orders denying his petition under Welfare and Institutions Code section 388[1] for return of Peyton N. to his custody and terminating parental rights. Father contends the denial of his section 388 petition was an abuse of discretion and substantial evidence does not support the order terminating parental rights. We affirm.

FACTS AND PROCEDURAL BACKGROUND[2]

Peyton was born with drugs in his system in February 2003 to Carla R. (mother) and father, who were not married or living together.[3] Father was homeless and transient. Peyton was detained by the Department of Children and Family Services at birth and placed in foster care. The dependency court ordered the Department to investigate father's home and detain Peyton in father's care when the Department concluded there were no safety or other disqualifying issues. On April 8, 2003, father identified a home he wanted the Department to assess. On April 17, 2004, after determining the home was safe, the Department detained Peyton with father.

However, father and Peyton did not move into the house the Department had assessed. Father remained transient and homeless. He and Peyton stayed in motels and homes of acquaintances. They moved frequently. Father refused help from Family Preservation Services to find housing. On May 28, 2003, the dependency court ruled that father was Peyton's presumed father. At the end of May 2003, father refused to let the Department fingerprint the friend in whose house he was staying. Father did not know

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1 Hereinafter, all statutory references are to the Welfare and Institutions Code.

2 As required, we state the facts in the light most favorable to the judgment. "We do not second-guess the [dependency] court's credibility calls or reweigh the evidence." (*In re Merrick V.* (2004) 122 Cal.App.4th 235, 254.)

3 Mother did not appeal.

when he would have a stable home for Peyton. On June 4, 2004, the Department detained Peyton from father.

On June 9, 2003, Peyton was declared a dependent child of the court, based on sustained allegations under section 300, subdivision (b) that mother's drug abuse placed Peyton at serious risk of harm. Custody was taken from mother. Pursuant to section 361.2,[4] the dependency court placed Peyton in the home-of-parent-father, on condition father obtain housing approved by the Department. The dependency court ordered father to keep the Department advised of his address at all times. Father planned to live with a friend, who had recently been charged with being under the influence of a controlled substance. The friend's home was suitable, and based on father's promise never to leave Peyton alone with her and to notify the Department if he moved, Peyton was released to father on July 10, 2003.

However, father was soon transient again. On July 28, 2003, the friend locked him out for nonpayment of rent. Father left Peyton in the care of the maternal aunt. He failed to keep an appointment with the social worker to discuss the situation and did not request return of Peyton to his care. He did not advise the social worker of his current whereabouts. On August 5, 2003, the Department filed a supplemental petition under section 387 for a more restrictive placement.[5] Father acknowledged he had been, and

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[4] Section 361.2 provides in pertinent part: "(a) When a [dependency] court orders removal of a child pursuant to Section 361, the [dependency] court shall first determine whether there is a parent of the child, with whom the child was not residing at the time that the events or conditions arose that brought the child within the provisions of Section 300, who desires to assume custody of the child. If that parent requests custody, the [dependency] court shall place the child with the parent unless it finds that placement with that parent would be detrimental to the safety, protection, or physical or emotional well-being of the child." The detriment finding must be based on clear and convincing evidence. (*In re Marquis D.* (1995) 38 Cal.App.4th 1813, 1827)

[5] Section 387 provides, in pertinent part: "An order changing or modifying a previous order by removing a child from the physical custody of a parent . . . and directing placement in a foster home, . . . shall be made only after noticed hearing upon a supplemental petition."

still was, transient and did not know when he would be able to request to have Peyton returned to him. On August 26, 2003, the dependency court found, by clear and convincing evidence, that return of Peyton to father's custody would create a substantial risk of danger to Peyton's physical or emotional well-being, and there were no reasonable means to protect Peyton without removal from father. The dependency court found that the previous home-of-parent-father order had not been effective in the protection of the child, terminated the home-of-parent-father order, and removed Peyton from father's custody. Father was ordered to obtain approved housing and participate in a parenting program. Reunification services and visitation were awarded. Father remained transient and homeless. He did not keep the social worker apprised of where he was living. He did not participate in a parenting class.

In October 2003, father planned to move into the paternal grandparents' home and request the dependency court to place Peyton in the custody of the paternal grandparents. Previously, father had kept the dependency hidden from the paternal grandparents. Father failed to implement the plan to move in with the paternal grandparents. On November 17, 2003, the dependency court terminated reunification services, set the matter for a hearing on March 15, 2004, under section 366.26 to select a permanent plan, and awarded father monitored visitation. Father did not seek review of the orders.

Father was incarcerated from February 2004 to March 22, 2004, on an outstanding warrant for driving with a suspended license. Upon his release from custody, the paternal grandparents permitted him to reside in their home on condition he adhere to a behavioral contract. On March 24, 2004, father moved into the paternal grandparents' home. On April 6, 2004, father filed a petition under section 388 requesting the order of November 11, 2003, be modified and an order be made returning Peyton to his custody. He had had brief visits with Peyton, for as little time as 15 minutes, on six occasions between December 9, 2003, and April 6, 2004. The Department learned that father had been having an ongoing relationship with mother, who continued to abuse drugs. Further, when Peyton had been in father's custody, father and mother used drugs together.

On April 15, 2004, a hearing was held on the section 388 petition. Peyton opposed the petition. The dependency court denied the petition. The dependency court found: "the only changed circumstances . . . is that father is determined to change his life. He hasn't changed it yet. . . . [¶] . . . [¶] [Nothing indicates] that the changes that the father has already made make it in the best interest of this child to move him out of the home where he has been practically since birth . . . ."

On May 28, 2004, parental rights were terminated. This timely appeal followed.

DISCUSSION

1. Section 388 Petition

Father contends that it was an abuse of discretion to deny his section 388 petition, because substantial evidence supported a finding that he had obtained stable housing. We disagree with the contention.

Section 388[6] provides that, if circumstances have changed such that it would be in the child's best interests for an order to be modified, the dependency court should modify the order. (*In re Kimberly F.* (1997) 56 Cal.App.4th 519, 526 & fn. 5.) "After reunification efforts have terminated, the focus shifts from family reunification toward promoting the best interests of the child." (*In re Zachary G.* (1999) 77 Cal.App.4th 799, 808.) "Once reunification services are ordered terminated, the focus shifts [from reunification] to the needs of the child for permanency and stability." (*In re Marilyn H.* (1993) 5 Cal.4th 295, 309.) " 'After reunification efforts have failed, it is not only important to seek an appropriate permanent solution—usually adoption when possible—

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[6] Section 388 provides in pertinent part that a parent "may, upon grounds of change of circumstance or new evidence, petition the court . . . for a hearing to change, modify, or set aside any order of court previously made . . . . [¶] . . . [¶] If it appears that the best interests of the child may be promoted by the proposed change of order, . . . the court shall order that a hearing be held . . . ."

it is also important to *implement* that solution reasonably promptly to minimize the time during which the child is in legal limbo. A child has a compelling right to a stable, permanent placement that allows a caretaker to make a full emotional commitment to the child. [Citation.] Courts should strive to give the child this stable, permanent placement, and this full emotional commitment, as promptly as reasonably possible . . . .' [Citation.]" (*In re Zeth S.* (2003) 31 Cal.4th 396, 413, fn. 10.) A parent's excuses for failure to visit are not relevant to the issue whether removing a child from placement and returning him to the parent after reunification had been terminated is in the child's best interest. (*Maricela C. v. Superior Court* (1998) 66 Cal.App.4th 1138, 1147-1148.)

"Whether a previously made order should be modified rests within the dependency court's discretion, and its determination will not be disturbed on appeal unless an abuse of discretion is clearly established." (*In re Michael B*. (1992) 8 Cal.App.4th 1698, 1704.) Abuse of discretion is established if the determination is not supported by substantial evidence. (*Michael U. v. Jamie B*. (1985) 39 Cal.3d 787, 796.) The party requesting the change of order has the burden of proof. (Cal. Rules of Court, rule 1432(f); *In re Michael B*., *supra,* 8 Cal.App.4th at p. 1703.)

The maternal aunt had had contact with Peyton since his birth and had been providing Peyton with a loving, safe, and nurturing home since he was six months old. Peyton was very happy in maternal aunt's home. He was openly affectionate with, attached to, and comfortable with her. Maternal aunt desired to adopt Peyton. At the hearing, maternal aunt testified she had always made herself available to father to facilitate visits with Peyton. She encouraged father's visitation. However, during the five months after reunification was terminated, father rarely requested visits. Prior to a few weeks before the section 388 hearing, father had visited less and less often.

In analyzing the dependency court's ruling denying father's section 388 petition after reunification services had been terminated, it is important to emphasize what is, and what is not, in issue. What is not in issue is any prior finding or order of the dependency court. What is in issue is the sufficiency of the evidence to support the dependency court's exercise of discretion denying father's section 388 petition. Our view of the

child's best interest or father's progress is not the test. We are restricted to a determination whether the dependency court abused its discretion. Considering that the focus of dependency proceedings after reunification efforts have been terminated is the best interest of the child, we conclude the order denying return of Peyton to father's custody was not an abuse of discretion, because it was supported by substantial evidence.

Substantial evidence supports the finding that circumstances did not change after reunification services were terminated on November 11, 2003, such that it would be in Peyton's best interest to be returned to father's custody. Prior to the termination of reunification services, father had been given custody of Peyton on two occasions, but, on each occasion, he soon returned to homelessness and transiency, and Peyton was detained from his care. Father had a pattern of falsely claiming he had found stable housing, and moving from place to place every few weeks. The dependency court had found that father's transiency created a substantial risk of harm to Peyton. Reunification was terminated, because, after nine months of knowing that a stable residence was required before he would be given custody of Peyton, and promising to establish a stable home, father had still not established stable housing. Subsequently, father was incarcerated. When the section 388 petition was heard, father had been living with the paternal grandparents for only three weeks. Previously, father had failed to follow through with a plan to reside with Peyton in the home of the paternal grandparents. Further, father had hidden Peyton's dependency from the paternal grandparents. The paternal grandparents required father to adhere to lengthy and detailed behavioral rules as a condition of living in their home. It is reasonable to infer from these facts that father had difficulty getting along with the paternal grandparents. It is reasonable to infer from father's pattern of instability and conflict with the paternal grandparents that three weeks of living in the paternal grandparents' home was not enough to show that father had achieved stability. Further, father had cared for Peyton for only a total of nine weeks. During the time he was responsible for caring for Peyton, father used drugs with mother. He rarely visited Peyton in the months after reunification was terminated, even though Peyton's caretaker encouraged visits. Father contends he had excuses for not visiting, but excuses are no

substitute for visitation. While father was drifting further and further away from Peyton, Peyton was becoming more and more bonded in the maternal aunt's home, where he was happy and doing well. Maternal aunt was the only stable parental figure Peyton knew. This is substantial evidence father's changing circumstances were not such that Peyton's best interest required return to father's custody. The trial court did not abuse its discretion.

2. Indian Child Welfare Act (ICWA) (25 U.S.C. § 1901)

A. Substantial Evidence

On April 15, 2004, the dependency court found that Peyton is an Indian child and ICWA applied to the proceedings, because Peyton had Indian heritage on his maternal side and was eligible for enrollment in the Chickasaw Tribe. Under ICWA, parental rights to an Indian child may not be terminated "in the absence of a determination, supported by evidence beyond a reasonable doubt, including testimony of qualified expert witnesses, that the continued custody of the child by the parent or Indian custodian is likely to result in serious emotional or physical damage to the child." (25 U.S.C. § 1912(f).) Accordingly, the dependency court appointed an expert in Indian child welfare. The expert found that Peyton's placement with the maternal aunt "is an American Indian, relative placement, which is consistent with the Indian Child Welfare Act." "It is my recommendation, based upon my knowledge of American Indian culture, my extensive mental health clinical background, and my professional knowledge of this case, that the [dependency] court can terminate parental rights of [mother and father]. [¶] Furthermore, it is my recommendation that the adoption by maternal aunt, . . . who states that she wants to adopt minor child, be pursued." At the conclusion of the section 366.26 hearing, the dependency court stated that it "finds beyond a reasonable doubt that return to [the] parents is likely to cause serious physical and emotional damage to the child . . . ."

Father contends this finding is not supported by substantial evidence. We disagree. Peyton was very young and vulnerable. Father had a long history of homelessness and transiency. He never achieved stability. Further, he continued his relationship with mother, who abused drugs. Father used drugs with mother when Peyton was in his care. This is substantial evidence that return to father was likely to cause serious physical and emotional damage to Peyton.

B. Indian Heritage of Alleged Father

In January 2004, Scott H. stated he was Peyton's father and requested paternity testing. Scott was incarcerated, and his release date was unknown. The social worker permitted genetic testing of Peyton and Scott's mother. On February 20, 2004, the Department requested that the dependency court order genetic testing of Scott. The dependency court denied the request. The dependency court stated: "We are headed into a [section 366.26] hearing, and the Department is saying that somebody thinks that there might be a father [or] somebody named Scott [H.], who is in a correctional facility in Banning and we should do a DNA test to see if this guy is the father. Never alleged by the mother. Never alleged by anybody. No, I'm not doing any kind of DNA testing on some man in the [ether] that somebody thinks might be a father out there. [¶] . . . And, at this point, if I ordered a DNA test at our expense and went through the trouble, which means that it wouldn't be done by March, the best this man could come up with at some point is he's the biological father at a [section 366.26] hearing with no rights whatsoever. None of this is in the child's best interest. I'm not ordering anything, no DNA test whatsoever."

On March 15, 2004, the date set for the section 366.26 hearing, the dependency court reviewed the report of the genetic test. The report stated that the results were "non-legally binding." The report further stated: "The information on this certificate is for personal informational purposes only." The dependency court found that it would not be in Peyton's best interest to make a finding concerning whether Scott was the biological

father and declined to make a finding. Counsel was appointed to represent Scott as an alleged father. No party sought appellate review.

For the hearing on April 15, 2004, a document was filed showing that an individual named Ronald, who had the same last name as Scott, was an enrolled member, Blackfeet Indian Reservation, Browning, Montana. The dependency court did not order that notice of the section 366.26 hearing be provided to the Blackfeet Indian tribe.

On the day before oral argument in this appeal, the Department advised this court that the lack of notice to the Blackfeet tribe may be a basis to reverse the order terminating parental rights because Scott was the biological father. (Letter from Pamela S. Landeros to the Court of Appeal, dated January 4, 2004.) The Department did not appeal the order terminating parental rights.

Further, the Department lacks standing, because the Department is not authorized under ICWA to challenge the order on grounds of lack of ICWA notice. (25 U.S.C. § 1914; *In re Daniel M.* (2003) 110 Cal.App.4th 703, 707-708 [a party not listed in 25 U.S.C. § 1914 has no standing to challenge order terminating parental rights on ground of lack of ICWA notice].) Pursuant to ICWA, only the Indian child, parent or Indian custodian, and Indian child's tribe may seek to overturn an order terminating parental rights on the ground of noncompliance with the notice provisions of ICWA. (See 25 U.S.C. § 1914.)[7]

Further, we are not required to rule on points that are argued in conclusory fashion and not supported by relevant legal authority. (*Kim v. Sumitomo Bank* (1993) 17 Cal.App.4th 974, 979.) We decline to exercise our discretion in this case.

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[7] Section 1914 of title 25 of the United States Code provides: "Any Indian child who is the subject of any action for foster care placement or termination of parental rights under State law, any parent or Indian custodian from whose custody such child was removed, and the Indian child's tribe may petition any court of competent jurisdiction to invalidate such action upon a showing that such action violated any provision of sections 1911 [Indian tribe jurisdiction], 1912 [notice of pending court proceedings], and 1913 [parental rights] of this title."

In any event, notice to the Blackfeet tribe was not required because no biological connection with Scott had been established during the proceedings. The tribe must be given notice of dependency proceedings when the dependency court knows or has reason to know that an Indian child is involved. (25 U.S.C. § 1912(a).) "Indian child" is defined as a child who is either a tribal member or eligible for tribal membership and the biological child of a tribal member. (25 U.S.C. § 1903(4).) Biological paternity must be established before ICWA applies. (Compare *In re Daniel M.*, *supra*, 1110 Cal.App.4th at pp. 706-709 [alleged father lacked standing to raise an issue of noncompliance with ICWA, because he had not established paternity prior to the § 366.26 hearing].) There was no evidence Peyton was a tribal member. No biological connection between Peyton and Scott was established.

Finally, any error is harmless, because parental rights were terminated based on the standard of proof, evidence and findings required by ICWA. The outcome would have been no different if notice had been given to the Blackfeet tribe.

3. <u>Exception To Termination of Parental Rights</u>

Father contends the finding that the exception to termination of parental rights in section 366.26, subdivision (c)(1)(A) was inapplicable is not supported by substantial evidence.

Appellate review of the dependency court's finding is limited to considering whether substantial evidence supports the finding. (See *In re Derek W.* (1999) 73 Cal.App.4th 823, 825.) "When considering a claim of insufficient evidence on appeal, we do not reweigh the evidence, but rather determine whether, after resolving all conflicts favorably to the prevailing party, and according the prevailing party the benefit of all reasonable inferences, there is substantial evidence to support the judgment." (*Scott v. Pacific Gas & Electric Co.* (1995) 11 Cal.4th 454, 465.)

Adoption is the permanent plan preferred by the Legislature for dependent children who are likely to be adopted if parental rights are terminated. (*In re Casey D.*

(1999) 70 Cal.App.4th 38, 50.) If the dependency court finds that a child may not be returned to his or her parent and is likely to be adopted, it must select adoption as the permanent plan unless it finds a "compelling" reason for determining that termination of parental rights would be detrimental to the child under one of five specified exceptions. (§ 366.26, subd. (c)(1).) The parent has the burden to prove the exception applies. (*In re Cristella C.* (1992) 6 Cal.App.4th 1363, 1373.)

The exception to termination in subdivision (c)(1)(A) of section 366.26 provides that detriment may be found if "[t]he parents or guardians have maintained regular visitation and contact with the child and the child would benefit from continuing the relationship." "[T]he exception does not permit a parent who has failed to reunify with an adoptable child to derail an adoption merely by showing the child would derive some benefit from continuing a relationship maintained during periods of visitation with the parent." (*In re Jasmine D.* (2000) 78 Cal.App.4th 1339, 1348.) The type of parent-child relationship that triggers the exception is a relationship which " 'promotes the well-being of the child to such a degree as to outweigh the well-being the child would gain in a permanent home with new, adoptive parents.' " (*In re Brandon C.* (1999) 71 Cal.App.4th 1530, 1534; accord, *In re Jasmine D.*, *supra*, 78 Cal.App.4th at pp. 1348-1350.)

Here, there was substantial evidence father had not maintained regular visitation and contact with Peyton. Moreover, throughout the dependency, father never deviated from his pattern of homelessness and transiency. He required Peyton to live an unsettled, transient lifestyle, which caused Peyton to be removed from his custody twice. Peyton had an opportunity to have the stability and permanence of an adoptive home. This is substantial evidence that Peyton's welfare required severance of the parental relationship. Thus, substantial evidence supports the finding the exception did not apply.

DISPOSITION

The orders are affirmed.

NOT TO BE PUBLISHED.

KRIEGLER, J.*

I concur:

MOSK, J.

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* Judge of the Superior Court for the Los Angeles Judicial District, assigned by the Chief Justice pursuant to article VI, section 6 of the California Constitution.

ARMSTRONG, J.

I dissent.

In this case, a non-offending father who was described by the trial court as "kind" and "loving" lost parental rights to his son, not because he did anything which would have justified a dependency petition under section 300 or ever, under either the legal or common definitions of the terms, abused or neglected his son, but because he did not have housing which satisfied DCFS.

The defects DCFS found in appellant's housing ranged from the potentially serious (lack of smoke detectors) to the absurd (lack of safety latches on cabinets, when Peyton was an infant). None would have supported the assertion of dependency jurisdiction. This is obviously true about DCFS's other great complaint about appellant, that he moved frequently and did not always tell DCFS where he was.

Further, none of these problems was of a magnitude which would have allowed a court to remove Peyton from his father's care if that father was a custodial parent, even if that father had abused his child.

This dependency was filed because Peyton's mother, Carla, had a drug problem, not because of anything appellant did. (There was no evidence that he knew of her drug problem.) He sought to raise Peyton, from the day of Peyton's birth. However, he did not live with Carla. That made him a non-custodial, non-offending father, so that the court was required to let Peyton live with him unless it found that the placement would be "detrimental" to Peyton's "safety, protection, or physical or emotional well-being . . . ." (Welf. & Inst. Code,[1] § 361.2, subd. (a).) If appellant had been a custodial, offending father, the court could not have refused to let Peyton live with him without a finding by clear and convincing evidence of the grave degree of danger set out in section 361,

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[1] All further statutory references are to that code unless otherwise indicated.

subdivision (c). Thus, this non-offending parent had less legal protection than an offending one.

It is true that the trial court's order on DCFS's August 2003 section 387 petition includes a finding that Peyton had to be removed from appellant's care because "substantial danger existed to the physical health of the minor and/or minor is suffering severe emotional damage," but I seriously question the sufficiency of the evidence for that finding.

The petition itself only alleged that Peyton was endangered because appellant had "failed to establish a stable home environment," meaning that he moved frequently, and that he had "refused community services," meaning that he had rejected DCFS. In the absence of other evidence -- and there is no other evidence -- those are not acts which endanger a child, sufficient to justify government intervention between parent and child.

There was no expert testimony or other evidence that Peyton ever suffered or was likely to suffer any emotional damage while in appellant's care or through his relationship with appellant. To the contrary, the evidence is that he was happy. There was no evidence that Peyton suffered any physical harm while in appellant's care or through his relationship with appellant, or that such harm was likely.

DCFS and other relatives saw Peyton when he was in appellant's care. No one ever wrote, testified, or told DCFS that Peyton so much as missed a meal or a diaper change, spent a day or night in dangerous or truly unsuitable housing, or was neglected in any way. There is no evidence that Peyton was ever hungry or cold or unsafe, or that appellant's relationship with him was other than what it should be. His commitment to Peyton did not waver when questions about his paternity were raised, and Peyton knew him as "Daddy."

Appellant is characterized as "homeless" and "transient." Those are the words used to describe people who live in the street or in shelters or flea-bag motels. They are pejoratives, and are often applied to those who are not just without a permanent address but are filthy, perhaps mentally unstable. Appellant was not such a person. He moved frequently, was not responsible to a roommate on the question of rent, and did not own

furniture. He resisted DCFS's intervention in his life and was slow to accept help from DCFS or his parents. Those circumstances may not have been ideal for Peyton, but they do not support a finding of endangerment. Again, none of these acts would have justified the assertion of jurisdiction under section 300 or would have allowed the County to interfere in appellant's and Peyton's relationship, but for Peyton's mother's problems.

I note, too, that while appellant may fairly be said to have been slow in seeking the help he needed, on several occasions he told DCFS that he was willing to accept help from his parents or from Peyton's aunt Gina, by leaving Peyton with them until he could make a home. Now, the help he accepted counts against him.

Nor am I impressed by the evidence that appellant was incarcerated, that he continued his relationship with Peyton's mother, Carla, and that he and Carla used drugs while Peyton was in his care. I read the record differently. Appellant was incarcerated because he cleared up an outstanding traffic warrant, as part of his plan to make a good home for Peyton. Appellant did continue his relationship with Carla. DCFS knew this, because reports indicate that they visited Peyton together. The reports do not indicate that appellant was ever instructed to end this relationship, and no one has contended that Peyton was harmed by spending time with his parents. Instead, the visits were permitted by DCFS and the court. The only evidence that appellant used drugs while he had Peyton in his care comes from a DCFS report that late in the case an individual named "Brenda" called the social worker to say that early in the case, she saw that behavior. Brenda was never called as a witness or subjected to cross-examination, and indeed was never closely questioned by the social worker. This is double hearsay, attributed to an individual with an untested reputation for veracity, an untested ability to observe, and an untested interest or bias. Surely, no judicial officer would find it competent evidence that appellant used drugs.

As our Supreme Court has explained, section 388 is an "escape mechanism" which the Legislature included in the statutory scheme "to accommodate the possibility that circumstances may change after the reunification period that may justify a change in a prior reunification order." (*In re Marilyn H.* (1993) 5 Cal.4th 295, 309.) Appellant is

faulted here for making his changes late in the case, but late changes are what section 388 is all about. The question is not whether appellant was late, but what he did.

Section 388 allows a court to change an order when a parent "completes a reformation in the short, final period after the termination of reunification services but before the actual termination of parental rights." (*In re Kimberly F.* (1997) 56 Cal.App.4th 519, 528.) This is such a case. When the trial court heard the section 388 petition, appellant had satisfactory housing -- for a time, DCFS recommended that Peyton be placed in that home, and described it in glowing terms -- and had thus resolved the problem which led to Peyton's removal from his care.

The case law directs trial courts deciding section 388 petitions to look first and foremost at the problem which led to the dependency. (*In re Kimberly F., supra,* 56 Cal.App.4th at p. 532.) The problem which led to the dependency was Carla's, not appellant's.

As a theoretical matter, permanent placement with Gina, the maternal aunt, was not before the trial court at the section 388 hearing. As a practical matter, the issue at the hearing was whether Gina or appellant would make the better parent for Peyton. That is not a question of ensuring a child's safety, which is the concern of the dependency law, but is a custody decision, which is not the province of the dependency court. "The juvenile dependency system . . . exists to protect abused and neglected children, not serve as a kind of super-psychologist." (*In re Kimberly F., supra,* 56 Cal.App.4th at p. 530, fn. 8.)

What is worse, the trial court had an inadequate record on which to base its decision regarding Peyton's best interest.

The trial court found that it was not in Peyton's best interest to remove him from the home where he had been "practically since his birth." In fact, Peyton spent the first two months of his life in foster care, then lived with appellant. He was not placed with Gina until he was about four months old, although some DCFS reports indicate that he was not placed there until he was six months old. (He was just over a year old at the time of the section 388 hearing.) During much of that time, he had visits, including overnight

weekend visits, with appellant's parents. The evidence is that Peyton was bonded to Gina *and* to appellant's parents, *and* knew appellant as "Daddy" and reached for him when he came to visit.

When placement with Gina was first investigated, in June 2003, she lived with her mother. Little or nothing more is said about the maternal grandmother's relationship with Peyton, and although the record indicates that Gina had a stepfather, nothing much is said about him. At some point -- the record is very unclear as to time -- Gina and Peyton moved out of her parents' house, for reasons which are not explained. Gina had two children (one of whom spent the school week with Gina's mother), and little is said about them or Peyton's relationship with them.

The paucity of information doesn't end there. In the fall of 2003, when Peyton had been with her for only a month or two, Gina told DCFS that she could no longer take care of him, citing "hardships and conflicts" which are not explicated in the record. She asked that he live with appellant's parents instead, a recommendation DCFS actually made. Gina had apparently changed her mind about this by March of 2004, but we do not know why she asked Peyton to be removed or why she changed her mind. Could the "hardships and conflicts" return? Moreover, the conclusion that Gina simply took against appellant and his family somewhere along the line is inescapable. There was evidence from appellant and his parents that after December, 2003, she thwarted their visits, suggested to DCFS that another man was Peyton's father, and even incurred the trial court's wrath by DNA testing Peyton, or at least allowing the Hills to say that they had done so, after the court denied the request for a test. Why did she do all of this? There is no explanation in the record.

When the trial court decided to deny appellant's section 388 petition, it decided that placement with Gina, not appellant, was in Peyton's best interest. As I noted above, where, as here, there is no evidence of abuse or neglect, that a custody decision, and is not the province of the dependency court. What is more, the trial court had an inadequate record for making the decision that Peyton's best interest lay with placement with Gina.

For these reasons, I conclude that the trial court abused its discretion when it denied appellant's section 399 motion. I would reverse.

ARMSTRONG, Acting P. J.